Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 83.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLEES.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Appellees.

ADDISON C. GILCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

STATUTES, ETC.

TEXTS.

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 83.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEES.

Opinion Below.

The opinion of the District Court (R. 25) is reported in 49 F. Supp. 95.

Jurisdiction.

It is the contention of the appellees that this court is without jurisdiction to determine the appeal. On June 21, 1943, this court postponed further consideration of the appellees' motion to dismiss, until hearing of the case on

the merits (R. 34). From a decision or judgment of the District Court of the United States for the District of Massachusetts, quashing an indictment against Jacob Hark and Hyman Yaffee, the Government claims a direct appeal under the so-called Criminal Appeals Act of March 2, 1902, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U.S.C. sec. 682, and section 238 of the Judicial Code as amended, 28 U.S.C. sec. 345.

Case Stated.

By indictment returned on December 21, 1942, and numbered 16021 on the criminal docket of the District Court, Jacob Hark and Hyman Yaffee were charged with violating section 1364.51 of Maximum Price Regulation No. 169, as amended, allegedly issued by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942,[1] in that they sold wholesale cuts of beef at prices higher than the maximum established by section 1364.52 of said regulation. A motion to quash was filed in behalf of the appellee Hark on January 4, 1943 (R. 12-16), and a motion raising the same points and identical in language was filed in behalf of the appellee Yaffee on the same day (R. 17-20). The motions to quash were heard by Sweeney, J., of the District Court on January 16, 1943. An opinion and decision thereon was filed in the District Court on March 5, 1943 (R. 25-29). The court set forth its reasoning in connection with the cause presented, and at the end

[1] The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, was amended by the Inflation Control Act, approved October 2, 1942, 56 Stat. 765, but the Price Administrator did not issue any new regulation covering wholesale beef cuts until December 10, 1942, to become effective December 16, 1942, in which sections 1364.51 through 1364.67 were revoked (7 Fed. Reg. 10331).

thereof said: "I, therefore, rule that these defendants cannot be held to answer to this indictment, because of the revocation of Section 1364.52 of Maximum Price Regulation No. 169, upon which the counts of the indictment are based, prior to the return of the indictment by the Grand Jury"; and concluded: "The motion to quash is granted" (R. 28-29). The appellant's statement of the case on page 5 of its brief fails to note this pertinent entry "motion to quash is granted."

In the docket of the court there appears the entry "March 5—Sweeney, J.—Opinion—Motion to quash is granted" (R. 33), and the further entry, "March 5—Sweeney, J.—Indictment quashed," which entry was subsequently attempted to be stricken by drawing a line through the same (Appendix B). The time for filing the appeal under the Criminal Appeals Act expired thirty days from March 5, 1943, the date of the decision. An attempt was made to extend the period of appeal by presenting to the court as of March 31, 1943, a written order quashing the indictment (R. 29). The customary filing stamp showing the date of filing in the clerk's office does not appear on this instrument (Appendix B).

On April 30, 1943, the Government presented an appeal to the court without notice to the appellees and had the same allowed (R. 29-33). Appellees filed a statement opposing jurisdiction on appeal and a motion to dismiss, upon the ground that the appeal was not taken within the time provided by the Criminal Appeals Act, and the further grounds that the motion to quash did not constitute a special plea in bar, and the decision and judgment was not based upon the invalidity and construction of the statute upon which the indictment was founded, but was based upon the insufficiency of the indictment.

It is claimed by the appellees that the order of March 31, 1943, as referred to on page 6 of the Appellant's Brief, was

not necessary, but was superfluous and a ruse on behalf of the Government to extend the appeal period. It was contrary to the practice of the District Court, namely: "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed'. It is not the practice to have a written order" (Appendix B, Appellant's Brief, p. 42).

The one issue which the court stated in its opinion constitutes sufficient grounds for quashing the indictment was raised by paragraph 25 of the appellees' motion to quash, to wit:

> "That at the time the indictment was returned, Sections 1364.51 and 1364.52 were not in force and effect, the same having been revoked or repealed by the Price Administrator on or about December 11, 1942, said revocation or repeal becoming effective December 16, 1942, which was prior to the date of the return of the indictment . . ."

As stated by Judge Sweeney, "On December 10, 1942, the revised Maximum Price Regulation No. 169 was issued to be effective December 16, 1942. While this purported to be an amendment to the original regulation, it provided that 'Sections 1364.51 through 1364.67 are revoked.' All counts of the indictment are based on Section 1364.52. The indictment was returned to the district court on December 21, 1942."

Statutes Involved.

Section 13 of the Revised Statutes, 1 U.S.C. sec. 29, and parts of the Criminal Appeals Act and the Emergency Price Control Act of 1942, are set out in the Appendix to

the Appellant's Brief, pp. 35-43. Pertinent parts of section 2 (c) and (g) of the Emergency Price Control Act and of the Inflation Control Act, omitted in the Appellant's Brief, are set forth in Appendix A herein.

Questions at Issue.

I.

Was the appeal seasonably taken and should the appeal be dismissed for want of jurisdiction?

II.

Is this an appeal from a decision or judgment quashing the indictment based upon the invalidity or construction of a statute upon which the indictment was founded or is this an appeal from a special plea in bar?

III.

Did the repeal of the regulation before an indictment bar prosecution by violation of the repealed regulation?

IV.

Was the decision of the court quashing the indictment sound in law?

Arguments, Points and Authorities.

I.

THE APPEAL WAS NOT SEASONABLY TAKEN AND SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

The opinion of Judge Sweeney dated March 5, 1943, concluded with the ruling of the court and the final decision or judgment thereon to the effect that "The motion to quash is granted" (R. 29).

This was all that was necessary to a final determination of the case and constituted the final judgment of that court. This is the accepted practice of the District Court for the District of Massachusetts in criminal cases wherein a demurrer or motion to quash has been filed.

The mere fact that the instrument was entitled "opinion" is not in and of itself conclusive. Both the opinion and the final order or decision may be combined in one instrument.

1 Freeman, Judgments (5th ed.) sec. 3.

They were so combined in this case (R. 25-29).

A motion to quash is based upon matters suggested by the record.

United States v. *Lehigh Valley R.R. Co.*, 45 F. (2d) 135.

An indictment may be quashed for any reason which would render ineffective a trial heard upon the accusation as formulated.

United States v. *Frankfeld*, 38 F. Supp. 1018.

The nature of motions to quash in the District of Massachusetts has been stated by Putnam, Circuit Judge, in *United States* v. *Grunberg et al.*, 131 Fed. 138, as follows:

> "On motions to quash, the Court accepts only such propositions as raise clear points of law. Any involved question should be raised by demurrer or motion in arrest of judgment where the Court must meet the issues and dispose of them holding them under consideration, if necessary, for that purpose; *but a motion to quash* being addressed to the discretion of the Court, and interposing avoidable delays unless

clearly justified, *should be decided on the spot and therefore our practice as to such motions is as stated.*" (Emphasis supplied.)

No written opinion or decision was necessary to decide the motion to quash. The court might, as is done in most cases, render an oral decision. If a motion to quash is granted in the District of Massachusetts, a mere statement by the court to this effect constitutes all that is necessary to end the case, and if the motion is denied, the defendant could immediately be ordered to trial. This is the customary procedure (Appellant's Brief, p. 42).

There is no rule of the District Court requiring a formal or additional order to be made, and in the absence of such a rule the established practice of the court below has the force and effect of a rule of court and is decisive in this court.

Fullerton v. *U. S. Bank*, 1 Pet. 604, 612.
Duncan v. *United States*, 7 Pet. 435, 451.
The Semaramis, 50 F. (2d) 623.

After the court had rendered its ruling and decision to the effect that the motion to quash was granted, it then became the duty of the clerk of the court to make the entry on the record.

Hoover v. *Lester*, 16 Cal. App. 151, 116 Pac. 382.
Security Trust & Savings Bank v. *Reser*, 58 Mont. 501, 193 Pac. 532.

In making the entry on the record, the clerk acts ministerially.

Takekawa v. *Hole*, 170 Cal. 323, 149 Pac. 593.
See 14 California Jurisprudence, 917.

A final judgment is one which terminates the litigation between the parties and leaves nothing to be done except the ministerial act of execution.

If a competent tribunal shows in intelligible language the relief granted as intending to be a determination of the rights of parties to an action, its claim to confidence will not be lessened by want of technical form nor by the absence of language commonly deemed especially appropriate to formal judicial records.

Ex Parte Lamar, 274 Fed. 160, 173.
Church v. Crossman, 41 Iowa, 373.

A recital of the date of judgment on the clerk's records is presumptively correct, notwithstanding that it was not entered until a later date.

Israel v. Bryan, 52 Cal. App. 66, 197 Pac. 121.

This principle has application with reference to the entry of March 5, showing that the judgment of the court was final on that date although a line was drawn through the entry after the expiration of the term of court (Appendix B).

The requisite authority or direction will be presumed where the record shows a judgment apparently regularly entered.

American Mortgage Co. v. Hill, 92 Ga. 297, 18 S.E. 425.
Ward v. White, 66 Ill. App. 155.
Wash. Nat. Bank v. Williams, 190 Mass. 497, 77 N.E. 383.
Burke v. Kaltenbach, 125 App. Div. 261, 109 N.Y. Supp. 225.

Even though, as urged in the Appellant's Brief (pp. 42, 43), a clerk failed to enter a judgment within the time required, performance is still due from him, and he should proceed with it and, when entered, it is as valid as if entered upon the date of the judgment.

Phillips v. *United States*, 264 Fed. 657, cert. den. 253 U.S. 491.

Bundy v. *Magruess*, 76 Cal. 532, 18 Pac. 668.

Irrespective of the exact date of entry by the clerk, the decision and judgment, entered as a matter of course in accordance with the practice of the District Court, was dated, and properly so, March 5, 1943 (Appendix B), and that is the date from which the period for appeal began to toll.

If the court intended to vacate the decision and judgment of March 5, 1943, by the subsequent order of March 31, it could have so stated in the usual formal language, *i.e.*, "The order entered in this case as of March 5, 1943, is hereby vacated."

Gould v. *Duluth & Dak. El. Co.*, 3 N.D. 96, 54 N.W. 316.

No intendment of a vacation or inference of a vacation could be drawn by the act of making an additional subsequent or surplus "order" at the request of counsel for the appellant.

Judge Sweeney has informed counsel that counsel for the appellant came to his office and pointed out that in *United States* v. *Swift*, 318 U.S. 442, Mr. Justice Jackson in a concurring opinion said:

". . . we would be greatly aided if the District Courts in dismissing an indictment would indicate in

the order the ground, and if more than one, would separately state and number them."

This statement could not have been a ruling of law. It was but a suggestion of improvement in Federal procedure in respect to criminal appeals.

This was the reason suggested to Judge Sweeney by counsel for the appellant for the making of the formal "order," and, without notice to the appellees, and after the entry by the clerk of the final decision of March 5 (shown to be stricken out in Appendix B), the "order" as of March 31 was drawn by appellant's counsel and signed by the court.

Judge Sweeney also informed counsel, as confirmed by letter from the clerk (Appendix C), that he told appellant's counsel at the time of signing the order dated March 31 that he did not mean or intend to grant the appellants an extension of time within which to file an appeal, had no power to do so, and only signed the order at the request of the appellants for the reason suggested by Justice Jackson in *United States v. Swift, supra.*

No such difficulty as appeared in the *Swift* case could arise in the instant case, as there was no doubt as to what the court based its decision upon, to wit:

> "The repeal of the regulation upon which the indictment was based" (R. 27-28).

There is no question but that the District Court would have no right to extend the time within which an appeal might be taken. It must be taken within thirty days, as provided under the Criminal Appeals Act.

The effect of the order of March 31, as treated by the appellant, is to make it appear that the District Court, by indirection, had extended the time within which to claim,

the appeal from March 5, 1943, the date of the decision or judgment, to March 31, 1943. It was obviously a bit of legal legerdemain to present and secure an order the effect of which would be to extend the statutory limit for appeal. If a *nunc pro tunc* order could be made as of the 31st day of March, 1943, to extend time to the 30th of April, 1943, or the 1st of May, suppose the Government had failed to take an appeal: Why could not an order now be made six months after the decision and the Government be permitted to go up on what is called a final order and thus nullify the statute?

To permit the entering of an order after a case has been decided and judgment given, which order has the effect of extending the time from which an appeal would begin to toll, if allowed, would bring this case within *Credit Co.* v. *Arkansas Central Railroad*, 128 U.S. 258, where this court said, at page 261:

> "The attempt made in this case to anticipate the actual time of presenting and filing the appeal by entering an order nunc pro tunc, does not help the case. When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

All of the cases cited in the Appellant's Brief (pp. 12, 13) cover demurrers, with one exception, *United States* v. *Lanza*, 260 U.S. 377, in which there was filed a plea in bar of *autrefois convict*. None of the cases came from courts where the practice of the court is not to enter a formal order, and the formal orders in those cases differed from those set out in the opinion to such an extent as to leave no doubt that the formal order was necessary to the finality

of the case in that particular court. This distinction was specifically pointed out by this court in *United States* v. *Mid State Horticultural Co.*, 306 U.S. 161.

In the *Mid State* case (footnote 2, p. 163), this court states:

> ". . . The court below wrote an opinion in which it stated 'the demurrers are sustained,' and filed the opinion June 16, 1938. *But in accordance with the court's practice*, final order was not entered until July 2, 1938. In that order the court sustained the demurrers and *ordered the defendant* discharged. The Government petitioned for appeal July 20, 1938, . . ." (Emphasis supplied.)

In the instant case there was a motion to quash, which differs from a demurrer in that the motion to quash is addressed to the discretion of the court and does not admit the facts set out in the indictment.

Durland v. *United States*, 161 U.S. 306.

A demurrer is a method by which a defendant may object to an indictment as insufficient in point of law and assumes all facts to be true.

United States v. *Boutin*, 251 Fed. 313.

In the *Mid State* case the final order was entered in accordance with the usual practice of the court. In the instant case there is no practice of the District Court for the District of Massachusetts requiring a final order or an additional order to a motion to quash. The practice is to make no additional order (Appellant's Brief, p. 42).

In the *Mid State* case the court made a final order that the defendants be discharged. There was no such order in

the instant case and none was necessary. In the instant case the final order was made on March 5, 1943, and as late as April 24, 1943, the last entry in the Docket was "March 5, 1943, Sweeney, J Indictment Quashed."

As supported by affidavit of counsel in Appendix D, that entry was stricken out as shown in Appendix B, without notice of any kind being given to counsel for appellees of the additional order dated March 31, 1943.

No case has been cited by the appellant where, as in the instant case and set out in Appellant's Brief (Appendix B, p. 42):

> "The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, 'Indictment quashed'. It is not the practice to have a written order."

In the instant case the order of March 31, in addition to being contrary to the practice of the court, said nothing more than was contained in the order of March 5, to wit: "The indictment is quashed." It stands on the same footing as *Sosa et al. v. Royal Bank of Canada*, 134 F. (2d) 944 (C.C.A. 1), where the court said:

> "This second judgment from which the present appeal was taken, was merely a reiteration of the order of March 9, 1942, dismissing the complaint. . . . The appeal is dismissed for lack of jurisdiction."

Although the clerk of court is competent to certify as to the practice of the court as set out in the Appellant's Brief (Appendix B, p. 42), the one authority concerning what the judge intended at the time of signing the repetitious order of March 31 is the judge himself, and Judge Sweeney has stated to counsel that his intention was as is here out-

lined, and he expressly told the appellant's counsel that the order would not extend the time for appeal from the date of decision and judgment of March 5, 1943, as is borne out by Appendix C.

The appellant was not entirely disingenuous in this statement:

> ". . . As will be there seen, the U. S. Attorney applied for the formal order because of prejudicial delay in making an entry in the Court's records to the effect that the indictment was quashed" (Appellant's Brief, p. 17).

The District Attorney is supposed to follow the progress of a case, to keep a record by day and date of all indictments, motions, proceedings, decisions, trials, findings and sentence thereon. He knew, when the case was decided on March 5, 1943, of the court's action and the suggestion in the opinion that the United States has a right of appeal (R. 28).

It is highly prejudicial to the interest of the defendant in a criminal case for counsel for the United States, without notice to the defendant, to have an order issued for the purpose of explaining the basis of the court's decision, in a district where the practice is not to enter a formal order, and then employ the order so obtained to extend the time within which an appeal can be taken.

II.

This Case is One in which No Direct Appeal to This Court Lies under the Criminal Appeals Act.

A motion to quash is not a "plea in bar," within the meaning of the Criminal Appeals Act, entitling the United States to take a direct appeal therefrom.

The decision or order appealed from was not based upon the construction or invalidity of the statute upon which the indictment was founded, as required by the Criminal Appeals Act, and therefore no appeal lies to this court.

United States v. *Hastings*, 296 U.S. 188.
United States v. *Halsey Stuart Co.*, 296 U.S. 451.
United States v. *Swift & Co.*, 318 U.S. 442.
United States v. *Borden Co.*, 308 U.S. 188.

The construction of the Emergency Price Control Act as it is necessary to construe the Act itself was in favor of the contention of the Government, the appellant, in that the Act was not unconstitutional The decision of the court as to the survival of the regulations after their repeal for the purpose of prosecuting offenses in violation thereof was based upon general principles of law which had nothing to do with the construction of the Emergency Price Control Act itself. And, in addition thereto, R.S. sec. 13, 1 U.S.C. sec. 29, was analyzed by the court and the inapplicability of that particular statute discussed at length, but that statute is not one upon which this indictment was founded.

United States v. *Borden Co.*, 308 U.S. 188, would seem to have no application to the case at bar, since there was a conspiracy to violate the Sherman Act itself, and the court sustained a demurrer upon the ground that the indictment did not charge an offense under the Sherman Act. There was no way that the court could escape construing the applicability of the Sherman Act; whereas in the case at bar the judge rests on a mere deficiency of the indictment as a pleading, as distinguished from the construction of the statute which underlies the indictment.

It will be noted here that an appeal will not lie where the decision of the court is based partly upon the construction of the statute and partly upon the insufficiency of the indictment.

In *United States* v. *Borden*, *supra*, this court said, at page 493:

> "Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination."

It was not necessary for the trial court to construe the penalties imposed by the Emergency Price Control Act in reaching the conclusion that the revocation of the regulations upon which the indictment was based left no issue upon which a trial could be held on the indictment. The judge's decision was based, at least in part, upon the insufficiency of the indictment.

The granting of the motion to quash the indictment was based, not upon the interpretation of the Emergency Price Control Act itself, but upon the interpretation, upon general principles of law, of the effect of the repeal by the Price Administrator of the regulation which he promulgated (R. 25-29). It was based upon the insufficiency of the indictment as returned.

III.

The Action of the District Court in Quashing the Indictment in This Case was Proper.

When the regulations upon which the indictment was based were repealed, the Grand Jury was without power to indict these defendants upon the repealed regulations, and the court was without jurisdiction or power to try the

defendants, and hence the motion to quash was properly allowed. Judge Sweeney has stated the principle of law relied upon in his opinion (R. 27):

> "The common law rule was that under the repeal of an Act without any reservation of its penalties, all criminal proceedings taken under it fell."

Numerous cases are cited by the court in support of that proposition. One of them is *United States* v. *Reisinger*, 128 U.S. 398.

In *Yeaton* v. *United States*, 5 Cranch, 281, 283, 3 Law. Ed. 101, 102, Chief Justice Marshall said:

> "It has been long settled upon general principles, that after the expiration or a repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by Statute."

Chief Justice Taney observed in *State of Maryland for Use of Washington County* v. *B. & O. R.R. Co.*, 3 How. 534, 552, 11 Law. Ed. 714, 722:

> "The repeal of the law imposing the penalty is of itself a remission."

In *United States* v. *Tynen*, 11 Wall. 88, 95, 20 Law. Ed. 153, 155, this court stated the principles applicable to criminal proceedings:

> "There can be no legal conviction nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal, the legislative will is expressed that no further proceedings be heard under the Act repealed."

It is clear that the language of the general saving provision in relation to the repeal of statutes was not intended to extend to anything but a statute.

United States v. *Chambers*, 291 U.S. 221, 224.

In the instant case it was not the repeal of a statute, by Congress, which wiped out the offense, but the revoking of the regulation by the authority who alone was given power to issue the regulation and who revoked it for reasons not apparent on the record but within his power to so do, the effect of which was to leave persons affected in a position they would have been in if the regulation had never been issued.

The decision of the trial court granting the motion to quash held that R.S. sec. 13, 1 U.S.C. sec. 29, had no application to a regulation. The appellees contend that the court was correct in this finding and argue that the Act of Congress was intended to take care of such statutes as might be created by Congress and did not apply to regulations or orders issued by an administrative officer. The power to establish a regulation as Price Administrator carries with it the power to revoke, modify or amend.

It is clear that Congress did not intend that R.S. sec. 13, should apply to regulations issued by the Price Administrator. Where Congress has specifically declared that such saving provisions as would apply to regulations issued by the Price Administrator are those set out in the Emergency Price Control Act itself, under the rule of construction, this is an exception which is urged in support of appellee's position.

If the authority revoking the regulation had desired or intended to have the provisions of the regulation still apply to pending cases or violations during its existence, he should have inserted a saving clause; revocation of the

regulation leaves it in the same position as if it had never been issued.

As pointed out by the court (R. 27)—

> "The Emergency Price Control Act of 1942, is not self-operative, and the type of crime which is charged in this indictment could not come into existence until regulations had been promulgated by the Administrator under legislative authority delegated to him by Congress."

The defendants-appellees are not subject to punishment under the Act, standing alone, without violation of some regulation made thereunder.

Under title II of the Act, sec. 201 (d)—

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

As far as the penal provisions of the Act are concerned, the Administrator therefore makes or unmakes the law. A repeal of a penal Act by the legislature has been deemed to be a general pardon.

A mere glance at the Act will show the enormous delegation of powers by the legislature to the Office of Price Administration.

Title I, sec. 1 (a), is set out in Appellant's Brief, p. 36, and shows the general purposes of the Act.

Section 2 (a) provides:

> "Whenever in the judgment of the Price Administrator [provided for in section 201] the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with

the purposes of this Act, *he may by regulation or order establish such maximum prices*, as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . ." (Emphasis supplied.)

The Price Administrator, on April 28, 1942, issued General Maximum Price Regulation, which became effective May 11, 1942.[2] It established the maximum price to be the same as the maximum charged during March, 1942, for a similar commodity. If no similar commodity was handled by the seller during March, 1942, he was to take the highest price of his most closely competitive seller of the same class for that commodity.

General Maximum Price Regulation continued in force until July 20, 1942, the effective date of Maximum Price Regulation No. 169.[3] Regulation No. 169 sought to establish maximum prices for beef and veal carcasses and wholesale cuts, inaugurated a system of grading upon which prices were predicated and provided under section 1364.52:

> "The Maximum Price for each grade of each beef and veal carcass shall be the highest price actually charged by the seller during the period of March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of the seller's sales of car-

[2] 7 Fed. Reg. 3153; and in the Statement of Considerations accompanying the same the Price Administrator said: "In large-scale affairs of practical importance, it is necessary to make a beginning. So long as the broad outlines of the general regulation are fair, particular difficulties may be handled upon subsequent prompt consideration. No other course is possible or practicable. This is particularly true in the domain of price regulation where so much depends upon prediction and a sense of judgment, and where so much must inevitably be a matter of trial and error and adjustment, with expectations tested in actual experience."

[3] 7 Fed. Reg. 4653.

> carcasses and wholesale cuts of the same grade were made during such period";

and further provided that, in the event that no sales were made during the base period, thereby preventing the seller from establishing maximum prices for such graded carcasses or cuts, the seller's maximum therefor shall be the maximum price of the most nearly competitive seller.

On or about September 17, 1942, an amendment to Regulation No. 169[1] was issued requiring a sex designation in addition to grading the beef with a definite maximum price per pound at which the various grades and sexes could be sold, but this regulation did not amend the maximum prices of wholesale cuts other than carcasses and specified that—

> "In any case where the maximum price of any beef wholesale cut was obtained from a most nearly competitive seller, such price shall be revised to conform with the adjusted maximum price of the competitive seller, if the price has been affected by this paragraph."

The Emergency Price Control Act purported to authorize the Price Administrator to establish the maximum prices at which commodities could be sold. Maximum Price Regulation No. 169, sec. 1364.52 (now revoked, and no longer effective), issued by the Price Administrator, merely sets forth a formula by which any person selling or delivering beef and veal carcasses and wholesale cuts may establish their maximum price at which that commodity may be sold by them.

The revoked section 1364.52 of Regulation No. 169 left it to the individual to establish the price. It merely set

[1] 7 Fed. Reg. 7314.

forth the method to be employed in arriving at such maximum.

On October 2, 1942, the Emergency Price Control Act was amended by the Inflation Control Act (56 Stat. 765). Section 3 of the Amendment provided:

> "... That in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing."

Notwithstanding this Amendment, no change in maximum prices was made until December 10, 1942, when the Administrator issued Revised Maximum Price Regulation No. 169,[5] which provided: "Sections 1364.52 through 1364.67 are revoked."

The Administrator, having the right to create a regulation, could destroy it just as readily. As indicated in his Statement of Considerations accompanying General Maximum Price Regulation, *supra*, his regulation was "a matter of trial, error and adjustment." Under these circumstances, by repealing, recalling or revoking a regulation, it is an admission that the regulation is not quite what the Administrator wants and that there should be a different regulation. It is just as ineffective as though it had never been set into operation.

Suppose, as contended by the appellees in this Brief and in their motions to quash (R. 12-17), the issuance of Maximum Price Regulation No. 169 by the Administrator was not legal and within the authority vested in him by the Emergency Price Control Act. Assume, further, that the Price Administrator recognized this when brought to his attention and sought to correct his regulation to conform

---

[5] 7 Fed. Reg. 10381.

to the law and be within his delegated authority. He would have the right to recall the illegal regulation and supersede it with one of legal composition. If he intended to change or alter the sections of Regulation No. 169 relating to Maximum Prices, he could have done so by a simple amendment, but he chose to "revoke" rather than "amend." When he withdrew rather than cut short the regulation, it ceased to exist just as effectively as though it had never been issued.

The appellant contends that *Curtis-Wright Exporting Co.* v. *United States*, 299 U.S. 304, is controlling. Appellees say it is distinguishable in many ways and is not applicable.

In the first place, the decision did not turn upon the delegation of power under Article I of the Constitution, but mainly upon the power that the President had by virtue of his office to deal with international matters outside the country. That power, buttressed by the Joint Resolution, seemed to be the principle thing which controlled the court in its decision. The court had said upon page 315:

> "Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States and falling within the category of foreign affairs."

Again, on page 319-320, the court said:

> "It is important to bear in mind that we are here dealing not alone with the authority vested in the President by an exertion of legislative power but as such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of

> the Federal Government in the field of international relations . . . congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone be involved."

In the instant case there could be no question of discretionary power of the President under section 2 of article II of the Constitution, the section dealing with the President's treaty-making powers.

The resolution of Congress giving the President authority to forbid the sale in this country of munitions to countries at war in the Chaco, page 312 of the Opinion, recites:

> "That it shall be unlawful to sell except under such limitations and exceptions as the President prescribes any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict or to any person, company, or association acting in the interest of either country until otherwise ordered by the President or by Congress."

Crimes committed during the life of the first proclamation could not be wiped out by the second proclamation but must continue until the statute of limitations has run against them. These crimes were of a serious character affecting the foreign relations of the United States and might involve conceivably the United States with foreign countries. It was not necessary that the President's second proclamation revoking the original proclamation should have a saving clause for the purpose of maintaining any proper action or prosecution for the enforcement of

such penalty, forfeiture or liability. The fact is that this Court has said so very plainly and has ignored the general saving clause in R.S. sec. 13, 1 U.S.C. sec. 29. But here again we must keep in mind that the delegations of power under the Emergency Price Control Act is limited by the principles laid down by this court in a long line of decisions. The power to conduct and regulate our foreign relations is a different thing and is plenary. Moreover, under the Emergency Price Control Act, the Price Administrator may change a rule or regulation fixing maximum prices at any time. It may be one thing today and another thing tomorrow; or one thing this month and another thing next month or the next year. To make the violation of every dead regulation a criminal offense is quite a different thing from punishing for the sale of fire arms to foreign countries endangering diplomatic relations of the United States with those countries.

The repeal of the first proclamation in the *Curtis-Wright* case did not substitute another proclamation creating other and additional crimes and offenses. In the case at bar the regulation under which the indictment had been drawn had been repealed and another regulation established in its stead. The Price Administrator had the power, so far as the making of the regulation is concerned, to make and unmake the law. The law without the regulation was a dead letter and ineffective.

This court has said in the *Curtis-Wright* case that it would have made some difference in the decision if the Joint Resolution had expired. We assume that the same proposition would have been true if there had been a repeal of the Joint Resolution. In that case offenses committed during the life of the proclamation would have died with the repeal. In the instant case the regulation upon which the indictment was based, Regulation No. 169, was repealed December 10, 1942, to become effective December

16, 1942. On October 2, 1942, the Price Control Act, while not repealed, was modified by the Inflation Control Act (56 Stat. 765), which provided a different standard in fixing the meat regulation, to wit:

> "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing."

That Act would appear to be the reason for the repeal of the original Regulation No. 169. If that is so, can the regulation still have vitality upon which to base the prosecution?

Appellant's Brief, beginning on page 30 and ending on page 31, says:

> "It would follow that every substantial revision of a Regulation would constitute a revocation."

This is just what it is and nothing more, when the regulation says it is revoked.

And continues:

> "Since the rule applies not only to prosecutions begun after repeal but also to those pending in a trial or appellate court at the time of repeal, violators of a maximum price regulation could, if revocation terminates the power to prosecute, escape punishment by the simple expedient of keeping the Court proceedings alive until the violated regulation has been superseded."

That is an entirely new theory of the criminal law. Violators never had such power and never will have such power. Criminal proceedings once properly begun and

the court having jurisdiction will continue to final judgment in a court of appeal, if the case gets to a court of appeal.

Section 1 (b) of the Price Control Act provides that the Act shall terminate on June 30, 1943 [8]—

> "or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution between the two Houses of the Congress, declaring that the future continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense."

Judge Sweeney points out in his opinion (R. 28):

> "But again this Saving Clause applies to the termination or repeal of the Act in any other manner specified. It has no application to the revocation of sections of a Regulation."

The appellants in their Brief (p. 31) contend:

> "The fact that Congress took pains to assure that the repeal or expiration of the entire statute should not terminate prosecutions for prior violations of the Regulation is a clear indication that *a fortiori* that

[8] On October 2, 1942, this was amended to June 30, 1944. Title 50 U.S.C. App. sec. 967.

> Congress did not intend the mere revocation of such Regulation during the life of the statute to destroy the power to penalize prior unlawful violations."

The intention of Congress is to be gathered from what Congress said in the words and the language used. To infer more than was said or stated in the saving clause is hardly permissible under any theory of statutory construction.

While the Act was outstanding and alive, the Price Administrator was the one who had the control of regulations, and having revoked a regulation without reservation, he was exercising his authority.

Section 2 (a) (50 U.S.C. App. sec. 902 G) of the Emergency Price Control Act provides that—

> "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

Judge Sweeney in his opinion said (R. 28):

> "It would seem that Congress has empowered the Administrator to insert a Saving Clause in any amended Regulation under this Section in this provision."

Judge Sweeney also said:

> "And if not contained in this section, I think the authority might be implied generally but if there is no power in the Administrator to add a Saving Clause in his Regulation, then the power rests completely in Congress."

Had Congress intended to extend the saving clause to prosecutions for violation of regulations repealed, it could have said so, and, not having said so, a strong presumption arises that Congress did not intend to continue prosecution of violations of regulations repealed. Suppose the regulations had been changed a dozen times: It would be highly impracticable to prosecute for violation of the whole series of regulations. If a repeal of the regulation does not repeal the law, it operates certainly to repeal the thing that gives the law life and vitality. Repeal all the regulations for the control of price or prices and the law would be nugatory and ineffective.

Summary.

I.

It is contended that the appeal was not seasonably taken and that the motion to dismiss should be granted. The Act says that the appeal must be taken within thirty days, and thirty days means thirty days. The court did not have the power to directly extend the period within which an appeal must be taken, and therefore the court did not have the power to do it indirectly; but in this case the court never intended to extend the time for filing the appeal.

II.

It is contended that the decision or judgment was not based upon the construction or validity of the Emergency Price Control Act, the statute upon which the indictment was based. There is nothing of real substance in the contention of the appellant that the Act was construed because of the application of certain general principles of law with reference to repeal of statutes or revocation of regulations.

III.

It is contended that the decision of the District Court was based in part at least upon an insufficiency of the indictment.

IV.

It is contended, finally, that at the time this indictment was brought, the regulations upon which it was based having been revoked, no prosecutions could be had for the violation of the same.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be sustained.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Appellees.

Appendix A.

The Constitution of the United States, article I, provides in part as follows:

> "Section 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

Article II of the Constitution of the United States provides in part as follows:

> "Section 2. . . . "He [the President] shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments."

The Act of January 30, 1942, 56 Stat. 23, 50 U.S.C. App. Supp. II, sec. 901 *et seq.*, called the Emergency Price Control Act of 1942, provides in part as follows:

> Section 2. (c) "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator

are necessary or proper in order to effectuate the purposes of this Act . . ."

(g) "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Inflation Control Act of 1942, 56 Stat. 765, title 50 U.S.C. App. sec. 961 *et seq.*, provides:

Sec. 3. "No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture . . .

"(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

"(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section; *Provided further*, That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural

commodity, as provided for by this Act, adequate weighting shall be given to farm labor. . . ."

Appendix B.

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts

No. 16021, Criminal

UNITED STATES by Indictment

v.

JACOB HARK et al

ORDER

(March 31, 1943)

SWEENEY, J. This cause came on to be heard upon the defendant's motion to quash the indictment alleging that Maximum Price Regulation No. 169 has been revoked by the Price Administrator, effective December 16, 1942, before the indictment was returned. This allegation was not denied by the Government. After hearing arguments of counsel for the defendant and of the United States Attorney, it is

Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

By the Court:

ARTHUR M. BROWN
Deputy Clerk

March 31, 1943
G C SWEENEY
U.S.D.J.

No. 16021, Contd.

Date	Proceedings	Clerk's Fees Plaintiff	Defendant
1943.	UNITED STATES v. JACOB HARK et al.		
Jan. 4	Pleas in abatement (2) filed by deft. Hark		
Jan. 4	Plea in abatement filed by deft. Yaffee		
Jan. 4	Motions to quash (2) filed by deft. Hark		
Jan. 4	Motion to quash filed by deft. Yaffee.		
Jan. 4	Demurrer filed by deft. Hark.		
Jan. 16	Sweeney, J. Hearing on pleas in abatement filed by deft. Hark, plea in abatement filed by deft. Yaffee, motions to quash filed by deft. Hark, motion to quash filed by deft. Yaffee, and demurrer filed by deft. Hark; taken under advisement; one week for briefs.		
March 5	Sweeney, J. - Opinion—Motion to quash is granted.		
~~March 5~~	~~Sweeney, J. Indictment quashed.~~		
March 31	Sweeney, J. Order quashing indictment.		
April 30	Petition for appeal filed by United States		
April 30	Statement as to jurisdiction filed by United States		
April 30	Assignment of errors and prayer for reversal filed by United States		
April 30	Sweeney, J. Order allowing appeal.		

April	30	Citation issued—returnable within forty days from this date.	
April	30	Praecipe filed by United States.	
June	2	Certified copy of transcript of record	25 10

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts.

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing are true photostatic copies of the ORDER, entered March 31, 1943, and of the ENTRIES on page 2 of the Criminal Docket of said Court from January 4, 1943 to June 2, 1943, inclusive, in the cause in said District Court entitled.

No. 16021 Criminal.

THE UNITED STATES, by Indictment,

v.

JACOB HARK and HYMAN YAFFEE, Defendants,

pending in said District Court.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this eighteenth day of September, A.D. 1943.

JAMES S. ALLEN

[SEAL]

Appendix C.

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts
Office of the Clerk
1525 Federal Bldg.
Boston

October 22, 1943

John Henry Lewin, Esq.,
Acting Assistant Attorney General
Department of Justice,
Washington, D. C.

Re: United States v. Jacob Hark, et al.
File—KLK 146-18-50-4.

Dear Sir:

In connection with my letter to you of July 28th about the docket entries in this case, I desire to give some additional information. The entry of March 5, 1943,

"Sweeney, J. Opinion—Motion to quash is granted"

was made within a few days of that date. The following entry under that date,

"Sweeney, J. Indictment quashed",

was not made until some time between March 25 and March 29, although according to our practice it should have been made upon entry of the opinion. When this omission was called to the attention of our docket clerk, she made the entry under date of March 5. This entry was made between March 25th and March 29th, so that, in accordance with our established practice at that time the thirty-day appeal period would start to run not later than March 29th, for, as I told you in my previous letter, it was not the practice of this Court to require written orders.

On or about March 31st, the Government presented a written order to me, and I accompanied the United States Attorney to Judge Sweeney's chambers. It was entirely new procedure for us to have a written order. I understand it was only because the United States represented that the Department of Justice wanted a written order in this case, so as to conform to the suggestion contained in Mr. Justice Jackson's concurring opinion in *United States v. Swift & Co.*, 318 U. S. 442, 446, that Judge Sweeney signed the order. I can recall that Judge Sweeney protested against the necessity of signing such an order when it was presented to him, but did sign it at the request of the United States Attorney. I also remember that Judge Sweeney said he was not going to adopt the practice of signing orders in all such future cases. When it came time to make an entry of this order in the books, I assumed that it was to take the place of the entry "Sweeney, J. Indictment quashed", which was made between March 25th and March 29th, and I told the docket clerk making the entry to cross out the entry which had been made previously between March 25th and March 29th.

When I wrote my letter to you, it seemed to me that I had told the Court that the entry of March 5 would necessarily be stricken out, but I find that the Court has no recollection of being so informed. There was no intention that the order of March 31 should extend the time for appeal, and it is the Court's recollection that he so stated to counsel.

By direction of the Court, I am sending a copy of this letter to counsel for the defendant.

Respectfully yours,

ARTHUR M. BROWN,
Deputy Clerk.

AMB-JDF.

Appendix D.

I, Leonard Poretsky, hereby declare that on April 23, 1943, in company with Associate Counsel, John H. Backus, went to the office of the Clerk of the District Court for the District of Massachusetts at Boston and examined the docket in the case of United States v. Hark et al. #16021.

The last entry in the docket was:

"March 5, 1943, Sweeney, J. Indictment quashed."

I again went to the Clerk's Office on April 24, 1943, at 11:25 A.M. and found this entry still on the docket.

On or about April 30, 1943, I discovered that the entry of March 5, 1943, above referred to, had a typewritten line stricken through it, and another entry appeared in the docket as of March 31, 1943, which entry was made subsequent to April 24th, the date I had last seen the docket.

Although all papers filed in the Office of the Clerk are stamped with the Clerk's stamp showing the date of filing thereof, no such stamp appears to have ever been put on the March 31 order, showing the date of filing with the clerk's office.

Counsel for the Appellees were not notified or present when the order of March 31 was presented to the court.

Dated at Boston, Massachusetts, this 22nd day of October, 1943.

LEONARD PORETSKY

Then personally appeared the above-named Leonard Poretsky and subscribed to the truth of the above statements the 22nd day of October, 1943.

Before me

WILLIAM B. BAKER,
Notary Public

Boston, Massachusetts.